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IN THE

Supreme Court of the United States

October Term, 1930.

Sun Insurance Office,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.

No. [illegible] 28

Norwich Union Fire Insurance Society, Ltd.,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.

No. [illegible] 29

The Home Insurance Company of New York,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.

No. [illegible] 30

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Subject Index.

Ohio Code Section 5986 has not been construed in opposition to above federal decisions..... 2

Any error may be presented by petition for writ of certiorari 10

Non-performance of the condition precedent requiring appraisal as to the amount of loss..... 11

Table of Cases.

Aetna Life Ins. Co. v. Moore, 231 U. S., 543..... 6

Carpenter v. The Providence Washington Ins. Co., 41 U. S. (16 Peters), 495, 511; 512..... 6

Fidelity-Phoenix Co. v. Handley (C. C. A., Fla., 1924), 296 Fed., 902..... 10

Foster v. Insurance Co., 101 O. S., 180..... 2

Glass v. Insurance Co., 117 O. S., 145..... 4

Hartford Fire Ins. Co. v. Glass, 117 O. S., 145..... 2

Hartford Fire Insurance Co. v. Nance, 12 Fed. (2), 575, 576 6

Insurance Company v. Carnahan, 63 O. S., 258..... 11
Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S., 397, 443..... 7
Maryland Casualty Co. v. Campbell, 255 Fed., 437, 441..... 9
Mutual Life Ins. Co. v. Hilton-Green, 241 U. S., 613.. 8
Ohio Farmers Ins. Co. v. Titus, 82 O. S., 161..... 4
Royal Ins. Co. v. Ries, 80 O. S., 272, 288..... 11
Stipcick v. Metropolitan Life Ins. Co., 8 Fed. (2), 285..... 9

IN THE

Supreme Court of the United States

October Term, 1930.

Sun Insurance Office,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.
No. 779.

Norwich Union Fire Insurance Society, Ltd.,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below,
No. 780.

The Home Insurance Company of New York,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.
No. 781.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OHIO CODE SECTION 9586 HAS NOT BEEN CONSTRUED IN OPPOSITION TO THE ABOVE FEDERAL DECISIONS, AND IN NO EVENT WOULD BE CONTROLLING ON THIS QUESTION, WHICH IS ONE OF GENERAL JURISPRUDENCE.

It is asserted (plaintiff's brief) that Ohio Code Section 9586 has been construed by the Ohio Supreme Court as expanding the authority of local agents beyond the limitation of authority contained in the insurance contract, which confines the agent's authority as to waiver or modification of the contract, to such waiver or modification as is endorsed in writing on the policy, and it is claimed by the plaintiff that such construction of the statute appears in the decisions of the Ohio Supreme Court in Hartford Fire Ins. Co. v. Glass, 117 O. S., 145, and Foster v. Insurance Co., 101 O. S., 180. We submit that these assertions by plaintiff's counsel are wholly inaccurate.

In the Foster case this statute in fact is not mentioned at all in the court's discussion of the effect or validity of the non-waiver clause of the policy and in the court's discussion of the extent of the authority of the agent. On the contrary the statute is solely mentioned in that case as sustaining the finding of the trial court on the issue as to whether Grigor was in fact the agent of the company or not, and is not mentioned at all in the court's

discussion of the **extent of the agent's authority.** In that case the insurance company made two separate contentions (1) That Grigor (who knew the violation of the condition) in that case was not the agent of the company in the transaction, and (2) That if Grigor was the agent of the company his knowledge could not operate to bind the company to a change of the policy conditions because to change the contract by anything short of written endorsement was beyond the agent's authority.

That the court's only mention of Section 9586 in the Foster decision was as tending to support the trial court's finding of the **fact of agency** and not **as to the extent of authority,** is clear from page 186 of the opinion, where the Supreme Court says:

> "It follows that the undisputed evidence was ample to support the conclusion of fact that Grigor is to be taken as the defendant's agent in procuring the insurance contract with reference to plaintiff's property. This conclusion is fortified by the provisions of Section 9586, General Code."

The court having thus determined that Grigor in that case was the agent of the company then proceeds on the second question involved, namely, the extent of Grigor's authority, and decides that question without any reference whatever, and without any construction whatever, of the statute.

The Foster case in fact, therefore, is simply a holding that the effect of the statute is to create an agency relation where none might otherwise exist and that the stat-

ute has no effect whatever upon the question of the extent of the authority of the agent, or whether his knowledge will be binding upon the company.

In the case of Glass v. Insurance Company, 117 O. S., 145, also cited by plaintiff as construing this statute, the statute was not mentioned,—far less, construed,—as contended by plaintiff.

In the Foster decision the law of Ohio was again restated to the effect that the limitation of the agent's authority contained in the policy is binding, and precludes waiver or estoppel by knowledge or statements of the agent after the policy is issued. Upon this ground the Ohio Supreme Court distinguishes its previous decision in **Ohio Farmers Ins. Co. v. Titus**, 82 O. S., 161, and re-affirms that case, where the claimed knowledge of the agent was after the policy was issued. As the Supreme Court says of the Titus case in the Foster decision, opinion pages 193-194:

> "There is nothing in the report of the Titus case to indicate that there was any breach of the stipulations of the policy at its inception, that is, at the time the policy was issued, much less that the company's agents had knowledge of such breach. When the insured received the policy and paid the first premium he obtained a policy which actually insured the property in question. Moreover, upon delivering the policy and receiving the initial premium, the functions of the company's agent ceased, so far as their apparent scope was concerned. If further power was to be attributed to the agent, it could only be found in some express authorization by the company in the policy or elsewhere. The terms of the policy itself negatived the existence

of further powers in the agent. Hence notice by the insured to the agent of any subsequent encumbrance placed upon the property insured could not be imputed to the company, for obvious reason that the agent's knowledge was obtained at a time when he had ceased to have any duty to perform with respect to the property or insurance in question, and no longer possessed power real or apparent with respect thereto.

"It must therefore be seen that the Titus case does not control the decision of the case at bar, and is in no sense in conflict with the principles of law herein declared."

If, as plaintiff contends, the Ohio statute, 9586, has been construed as nullifying the contract limitation of agent's authority, then such limitation of authority should equally be nullified as to acts, statements or knowledge of the agent after the policy is issued as before. Yet the Ohio Supreme Court in the above case has held squarely that the limitation of authority in the policy is binding as to what occurs after the policy is issued notwithstanding the statute.

Plaintiff's claim that the Ohio Supreme Court has construed the statute as nullifying the contract limitation of agent's authority is therefore clearly not well taken.

Even if the Ohio courts had construed the statute as contended by plaintiff, this would not aid the plaintiff to escape the binding effect of the decisions of the United States Supreme Court on this question of general jurisprudence as to how the terms of the insurance contract shall be modified or waived, which, because it is a ques-

tion of general jurisprudence, is governed by the federal decisions and not by the state decisions. As held by the Sixth Circuit in **Hartford Fire Insurance Co. v. Nance**, 12 Fed. (2) 575, 576 (re-affirmed by this court in Insurance Co. v. Jones, 15 Fed. (2), 1.):

> "What we must finally determine is not a matter of validity or interpretation; it is whether the terms of a written contract—where the contract itself prohibits modification except in writing—may be varied by parol evidence for the purpose of asserting estoppel. This, we think, is a matter of general jurisprudence."

No question of "rule of property" or of "public policy" or of "comity between states" is here involved, but solely the question, as stated by the court in the language thus quoted from the Nance decision, as to whether the terms of a written contract, where the contract itself prohibits modification except in writing, may be varied by parol evidence for the purpose of asserting estoppel. The decisions cited by plaintiff on the question of "rule of property," "public policy" and "comity between states" are therefore wholly irrelevant.

To the same effect are: **Carpenter v. The Providence Washington Ins. Co.**, 41 U. S. (16 Peters) 495, 511, 512:

> "if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment."

Aetna Life Ins. Co. v. Moore, 231 U. S., 543, (see Syllabus and page 559).

True, as stated in plaintiff's brief, it is necessary for foreign insurance companies to obtain licenses to do business in Ohio. But it does not follow from this fact that a Federal Court will not follow Federal Court decisions on a question of general jurisprudence, such as the question here involved. Licenses to foreign companies to do business in a given state had been granted in every case where the Federal Courts have adhered to their own decisions on such questions of general jurisprudence.

These insurance companies by becoming licensed to do business in Ohio never submitted themselves to any other rule than the rule of the Federal Courts on this point of general commercial law, in any case and as to any contract where the Federal Courts had jurisdiction. The suggestion of plaintiff to the contrary is clearly without merit, as the Supreme Court of the United States held in **Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.**, 129 U. S., 397, 443:

> "* * * it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. Railroad Co. v. Lockwood, 17 Wall, 357, 368; Myrick v. Michigan Central Railroad, 107 U. S., 102; Carpenter v. Providence Washington Inc. Co., 16 Peters, 495, 511; Swift v. Tyson, 16 Pet., 1; Railroad Co. v. National Bank, 102 U. S., 14; Burgess v. Siligman, 107 U. S., 20, 33; Smith v. Alabama, 124 U. S., 365, 478; Bucher v. Cheshire Railroad, 125 U. S., 555, 583."

All of the cases cited in this connection in plaintiff's brief are cases in which the only question involved was the construction or validity of various provisions of the contracts. In none of them was the question involved as to whether the terms of a written contract, which by its terms prohibits modification except in writing, may be varied by parol evidence for the purpose of creating an estoppel. These cases therefore are entirely consistent with the decisions cited in our opening brief, pages 44-45. The cases cited by plaintiff therefore do not aid the plaintiff's contention.

Agency statutes, similar to Ohio Code Section 9586, relied upon by the plaintiff, have been repeatedly held by this court, and all other Federal Courts, not to have the effect claimed for by plaintiff of enlarging the authority of the agent as defined by the written policy of insurance.

Mutual Life Ins. Co. v. Hilton-Green, 241 U. S., 613:

> "The designation as agent of an insurance company, made by Florida General Statute Section 2765, of any person who in any wise, directly or indirectly, makes or causes to be made any contract of insurance for or on account of such insurance company, does not affect the true relationship to the parties to a life insurance contract of the local manager, soliciting agent, and local medical examiners, who were in fact designated agents of the company, with power to bind it within their apparent authority, and their knowledge of the falsity and fraudulent character of material representations by the insured in the application, which is made an essential constituent of the policy, is not the knowledge of the company, and does not estop it to rely upon such

misrepresentation as a defense to an action on the policy."

Section 2765 of the Florida statutes, supra, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and third persons, and certainly does not raise special agents, with limited authority, into general ones, possessing unlimited power.

In construing this Florida statute, the United States Court of Appeals of the Fifth Circuit (Florida), in Maryland Casualty Co. v. Campbell (decided 1919), 255 Fed. 437, 441, holds:

"That statute does not have the effect of conferring power which the contract of the parties shows was expressly withheld. Though each of the persons who according to the plaintiff's testimony was informed of the falsity of his statement that he had not received medical attention was an agent of the defendant, he was an agent from whom, by the terms of the contract entered into, the principal withheld any authority to change the contract or to waive any of its provisions and notice to whom or where knowledge it was stipulated should not be held to effect a waiver or change in the contract."

Stipcick v. Metropolitan Life Ins. Co., 8 Fed. (2) 285, (Or. 1925):

"Section 6435, Oregon laws, which provides that one who solicits and procures an application for life insurance shall be regarded as an agent of the company, does not fix the scope of such agent's authority and does not raise a special agent with limited authority to a general agent."

Fidelity-Phenix Co. v. Handley (C. C. A. Fla. 1924), 296 Fed., 902:

P. 904: "It is said, however, that as Jacobs was the agent of the company, the Florida statute (Section 4256, Rev. St.), brings home to them the knowledge communicated to him. The same question involving the same statute was before the court in Maryland Casualty Co. v. Campbell, 255 Fed., 47, where quoting from Mutual Life Co. v. Hilton-Green, 241 U. S., this court said: 'That statute does not have the effect of conferring a power which the contract of the parties shows was explicitly withheld.'"

ANY ERROR MAY BE PRESENTED BY PETITION FOR WRIT OF CERTIORARI.

Plaintiff assumes that the only ground for this petition for writ of certiorari is conflict between Courts of Appeal, and further assumes that the only question which this court can consider is a question as to which there has been such conflict.

The petition for the writ in this case on its face shows that other grounds in addition to that of conflict between Courts of Appeal are urged for the granting of this writ. Rule 38, Subdivision 5 of this court expressly recognizes all of the grounds in addition to the ground of conflict of decisions which are set forth in our petition for writ of certiorari, and this court is therefore not limited, as plaintiff contends, to a consideration of questions involved in conflict between Courts of Appeal.

NONPERFORMANCE OF THE CONDITION PRECEDENT REQUIRING APPRAISAL AS TO THE AMOUNT OF THE LOSS.

The suggestion is made by the plaintiff that he was absolved from performance of condition precedent as to appraisal of the amount of the loss because the wool in question was totally destroyed.

Even if personal property is totally destroyed, this does not excuse the failure of the plaintiff to perform the condition precedent requiring appraisal. This is settled law.

Thus in Insurance Company v. Carnahan, 19 Ohio Circuit Court, 114, the Circuit Court held that the fact that the personal property in question was totally destroyed excused the plaintiff from obtaining an appraisal or offering so to do. However, the judgment of the Circuit Court on this point was reversed by the Ohio Supreme Court in **Insurance Company v. Carnahan**, 63 O. S., 258, where final judgment was rendered in favor of the insurance company on the ground of failure by the insured to perform the condition as to appraisal, notwithstanding the loss to the property in that case was total. The Supreme Court thus in the Carnahan case squarely settled the proposition that the fact that the loss to personal property is total does not excuse the insured from complying with the appraisal condition.

In **Royal Ins. Co. v. Ries**, 80 O. S., 272, 288, the Su-

preme Court again held that the fact that the perso
property or a large part thereof was completely
literated by the fire in no wise invalidated or affec
the validity of the condition precedent requiring
praisal in case of disagreement. The language of
court in this connection is as follows:

> "The appraisers together inspected what was
> of the property, old junk or salvage they termed
> and agreed as to its value. The umpire was
> required to appraise what they could not agree up
> and as what they did not agree upon was not in
> istence, his failure to inspect the place of the
> did not warrant the court in setting aside the
> praisement."

Respectfully submitted,

ROLLAND M. EDMONDS,

Counsel for Petitioner.